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EX PARTE OR LATE FILED

November 6, 1998

Magalie Roman Salas  
Secretary  
Federal Communications Commission  
Rm 222  
1919 M Street, NW  
Washington, DC 20554

Re: Ex Parte  
Reciprocal Compensation for Dial-up Calls to ISPs  
CC Docket No. 98-96; CPD No. 97-30

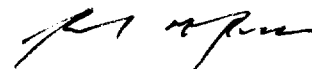
Dear Ms. Salas:

Pursuant to Sections 1.1206(b)(1) and (2) of the Commission's rules, 47 C.F.R. Sections 1.1206(b)(1) and (2), I am providing this notice of *ex parte* presentations in the above captioned matters.

Yesterday, on behalf of KMC Telecom, Inc., I met with Kevin Martin, Legal Advisor to Commissioner Harold Furchgott-Roth concerning reciprocal compensation for dial-up calls to Internet Service Providers. We discussed issues presented in the attached letter to Commissioner Harold Furchgott-Roth.

The attached letter to Commissioner Harold-Furchgott Roth was delivered to his office yesterday. Identical letters were delivered today to Chairman William Kennard and Commissioners Susan Ness, Michael Powell and Gloria Tristani.

Sincerely,



Richard Rindler

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November 5, 1998

Honorable Harold Furchtgott-Roth  
Commissioner  
Federal Communications Commission  
1919 M Street, NW  
Washington, DC 20554

Re: Ex Parte  
Reciprocal Compensation for Dial-up Calls to ISPs  
CC Docket No. 98-96; CPD No. 97-30

Dear Mr. Furchtgott-Roth:

On behalf of KMC Telecom, Inc., I wanted to share with you an approach to resolving issues concerning reciprocal compensation for dial-up calls to Internet Service Providers (ISPs) in the above-captioned proceedings. As discussed below, this approach would: preserve the Commission's jurisdiction over dial-up calls to ISPs; be fully consistent with relevant statutory provisions and Commission precedent, including the recently released *DSL Jurisdiction Order*;<sup>1</sup> and preserve state authority over, and determinations concerning, reciprocal compensation in existing interconnection agreements. KMC stresses that it fully supports the recent letter from the Association of Local Telecommunications Services ("ALTS") concerning an approach to resolving issues in the above-captioned proceedings.<sup>2</sup> KMC offers the approach outlined in this letter as a further possible aid to the Commission's deliberations in the above-captioned proceedings.

Under this suggested approach, the Commission would determine that a dial-up call originating on an incumbent local exchange carrier ("LEC") network that is handed off to a competitive LEC ("CLEC") that then transmits the call to an ISP can be a jurisdictionally interstate communications by wire as defined in Sections 3(22) and 3(51) of the Communications Act of 1934, as amended ("the Act") when the caller is engaging in communications with a point

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<sup>1</sup> *In the Matter of GTE Telephone Operating Cos.*, CC Docket No. 98-79, FCC 98-292, released October 30, 1998 ("*DSL Jurisdiction Order*").

<sup>2</sup> Letter to Magalie Roman Salas from ALTS, November 4, 1998.

in a different state.<sup>3</sup> Thus, the Commission would affirm what it has stated is its long-standing basis for determining its jurisdiction over interstate communications based on an end-to-end analysis of the communication in question. This determination would be fully consistent with, and build upon, the jurisdictional analysis set forth in the *DSL Jurisdictional Order* concerning DSL services used to connect to ISPs. In that decision, the Commission determined that a DSL service used to connect to an Internet site in a different state can be part of a continuous interstate communication by wire.

The Commission would additionally determine that it is immaterial to its jurisdictional analysis whether the interstate communications by wire is comprised wholly of "telecommunications" as defined in Section (3)(43) of the Act, or additionally in part of an "information service" as defined in Section (3)(20) of the Act.<sup>4</sup> Applied to dial-up calls to ISPs, the Commission would affirm that such calls fall within the jurisdiction of the Commission notwithstanding that part of the communications is an information service. This finding also tracks the similar finding in the *DSL Jurisdiction Order* concerning DSL when used to reach ISPs and the Internet.<sup>5</sup>

The Commission would further affirm its long standing view that information services can be comprised of telecommunications components and/or use telecommunications services. Thus, in *Computer II* the Commission recognized that information services can be provided by means of telecommunications.<sup>6</sup> Similarly, by the amendments to the Communications Act contained in the Telecommunications Act of 1996 ("1996 Act"), Congress defined information services as being provided "via telecommunications."<sup>7</sup> The Commission would additionally affirm its long-standing view that, although comprised of telecommunications components, those components lose their separate legal character and that for regulatory purposes the information service will be considered wholly an information service. For example, in *Computer II* the Commission adopted a "contamination doctrine" under which any service that is partly an information service would be legally cognizable under the Commission's rules only as an

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<sup>3</sup> 47 U.S.C. Sec. 153(22), (51).

<sup>4</sup> 47 U.S.C. Sec. 153(43), (20).

<sup>5</sup> *DSL Jurisdiction Order*, para. 17.

<sup>6</sup> *Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II)*, 77 FCC 2d 384, ¶ 97 (1980) (*Computer II Final Decision*), recon., 84 FCC 2d 50 (1980) (*Reconsideration Order*), further recon., 88 FCC 2d 512 (1981) (*Further Reconsideration Order*), affirmed sub nom. *Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983).

<sup>7</sup> 47 U.S.C. Sec. 153(20).

information service.<sup>8</sup> Similarly, in its April 10, 1998 *Report to Congress* the Commission, in discussing the fact that Internet access services are comprised of a mixture of information and telecommunications services, concluded that "it would be incorrect to conclude that Internet access providers offer subscribers separate services – electronic mail, Web browsing, and others – that should be deemed to have separate legal status, so that, for example, we might deem electronic mail to be a 'telecommunications service,' and Web hosting to be an 'information service.'"<sup>9</sup> Rather, the Commission determined that Internet access involved information service capabilities that were "inextricably intertwined" with data transport and that the service was appropriately classified as wholly an information service.<sup>10</sup> The Commission effectuated this determination both in the *Universal Service Order*<sup>11</sup> and in the *Report to Congress*<sup>12</sup> by determining that ISPs would not be required to contribute to universal service funding even though information services can be comprised in part of telecommunications components.

Moreover, in the *Report to Congress* the Commission determined that, as a matter of statutory construction, the statutory definitions of information and telecommunications services are "mutually exclusive."<sup>13</sup> Thus, "an entity offering a simple, transparent transmission path, without the capability of providing enhanced functionality, offers 'telecommunications.' By contrast, when an entity offers transmission incorporating the 'capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information,' it does not offer telecommunications. Rather, it offers an 'information service' even though it uses telecommunications to do so."<sup>14</sup>

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<sup>8</sup> "Under the 'contamination theory' developed in the course of the *Computer II* regulatory regime, VANs that offer enhanced protocol processing services in conjunction with basic transmission services are treated as unregulated enhanced service providers. The enhanced component of their offerings 'contaminates' the basic component, and the entire offering is therefore considered to be enhanced." *Computer III Phase II Recon. Order*, 3 FCC Rcd at 1153, n. 23.

<sup>9</sup> *In the Matter of Federal-State Joint Board on Universal Service*, Report to Congress, CC Docket No. 96-45, FCC 98-67, released April 10, 1998, para. 79 ("Report to Congress").

<sup>10</sup> *Id.* para. 80.

<sup>11</sup> *In the Matter of Federal-State Joint Board on Universal Service*, Report to Congress, CC Docket No. 96-45, 12 FCC Rcd 8776, 9180 (1997) ("*Universal Service Order*").

<sup>12</sup> *Report to Congress*, paras 123-130.

<sup>13</sup> *Id.* para. 39.

<sup>14</sup> *Id.*

KMC respectfully suggests, in light of these precedents, that the Commission must address an issue of first impression: whether, for purposes of reciprocal compensation under Section 251(b)(5), the telecommunications portion of a dial-up call to an ISP terminates when the communications reaches the ISP. KMC respectfully suggests that the Commission must conclude that, for purposes of reciprocal compensation, the telecommunications portion of the dial-up call to the ISP terminates when the call reaches the ISP in light of the Commission's determinations that information services and telecommunications are legally mutually exclusive and that any separate telecommunications components of Internet access would not be given any separate legal status. Thus, in the same way that the fact that Internet access service can be comprised in part of telecommunications components does not result in the legal consequence that ISPs must make universal service contributions, it also does not mean that, legally, the telecommunications component of an ISP's service does not terminate locally for purposes of reciprocal compensation. The Commission should determine that, for purposes of reciprocal compensation, the telecommunications portion of a dial-up call terminates at the ISP, and that, therefore, the CLEC is engaged in "transport and termination of telecommunications"<sup>15</sup> and is entitled to reciprocal compensation from the incumbent LEC for performing those functions.

This finding would be fully consistent with the jurisdictional determinations in the *DSL Jurisdiction Order*. In the *DSL Jurisdiction Order*, the Commission determined that there was a continuous communication "for jurisdictional purposes."<sup>16</sup> While it rejected, for purposes of jurisdictional analysis, contentions that there were separate intrastate and interstate components of the communication,<sup>17</sup> it did not determine that, as a legal matter under the Act, that there were not separately legally cognizable telecommunications and information service components of the interstate communication. Thus, the Commission could determine, without conflicting with its jurisdictional analysis in the *DSL Jurisdiction Order*, that dial-up calls to ISPs can be interstate communications by wire notwithstanding that the telecommunications portion of the call terminates for reciprocal compensation purposes at the ISP. Moreover, it would not be necessary for the Commission to alter any finding that ISPs use telecommunications in provision of an information service. As noted, that has been the Commission's position for many years. Rather, the Commission would merely affirm that information and telecommunications services are legally mutually exclusive and that, therefore, legally, the telecommunications portion of the call terminates at the ISP.

The approach suggested in this letter would also be fully consistent with the historical treatment of calls to ISPs as local for other regulatory purposes. Thus, as is familiar to the Commission, under the "ESP exemption" ISPs may use locally tariffed services to originate and

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<sup>15</sup> 47 U.S.C. Sec. 251(b)(5).

<sup>16</sup> *DSL Jurisdictional Order*, para. 20.

<sup>17</sup> *Id.*

terminate calls. Incumbent LECs have also treated ISP traffic as local for jurisdictional separations purposes. Consumers are also billed for their calls to ISPs as local calls. KMC fully supports the views expressed in the November 2 letter from ALTS concerning the historical local treatment of calls to ISPs for virtually all regulatory purposes.

This suggested approach to resolving reciprocal compensation issues would fully preserve state commission-approved interconnection agreements implementing the 1996 Act. In essence, the Commission would determine that because the transport and termination of traffic to ISPs is entitled to reciprocal compensation under the 1996 Act, there is no basis to assert that the Commission has altered or disturbed, or removed from state jurisdiction, supervision and enforcement of existing interconnection agreements. This approach is also not likely to transgress the determination of the 8th Circuit in *Iowa Utilities Board* that states have exclusive and plenary authority to enforce interconnection agreements.<sup>18</sup>

KMC applauds reports that the Commission intends to preserve existing interconnection agreements governing dial-up calls to ISPs. KMC offers the foregoing as one alternative for the Commission to reach this goal while also fully recognizing the jurisdictionally interstate nature of dial-up calls to ISPs based on the analysis set forth in the *DSL Jurisdiction Order*.

Respectfully submitted,



Richard Rindler  
Counsel for KMC Telecom, Inc.

cc: Commissioners  
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Richard Lerner  
Tamara Priess  
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<sup>18</sup> States have "primary authority to enforce the substantive terms of the agreements made pursuant to sections 251 and 252." *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 804 (8<sup>th</sup> Cir. 1997), *cert. granted on other grounds sub nom.* *AT&T Corp. v. Iowa Utils. Bd.*, 118 S.Ct. 879 (1998)) ("*Iowa Utilities Board*"). The court also described this state authority as "plenary." *Id.*